REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.305 OF 2015

IN THE ESTATE OF: THE LATE M T K alias

T W/O KILEL (DECEASED)

E C K.....PETITIONER/APPLICANT

VS

C C.....1ST RESPONDENT

B C.....2ND RESPONDENT

RULING

1. By her application dated 17th March 2016, the applicant, E C K, seeks the following orders:

> **1. That the consent order in this proceedings confirming the applicant and the 1st respondent as the joint petitioners to the estates be set aside.**
>
> **2. That the Honourable Court be pleased to issue grant of letters of administration intestate to the estate of the deceased to the petitioner/applicant; E C K.**
>
> **3. Cost of the application be paid out of the estate.**

2. The application is based on the following grounds:

> **1.That the applicant was never consulted to the making and approval of such consent.**
>
> **2.The applicant is the only child of the deceased and the only beneficiary to the estate of the deceased.**
>
> **3.The respondents are not children of the deceased.**
>
> **4.They misrepresented themselves as the beneficiaries to the estates and fraudulently initiated this proceedings.**
>
> **5.That the deceased had no adopted children her life time including the respondents who are claiming as such.**

6.That the respondents have not in their claim justified the same before court.

7.The respondents were not maintained by the deceased prior to her death.

8.The respondents were employees of the applicant and at the time of their engagement they were adults with their families hence not competent for adoption, they are strangers to the estate.

The Applicant's Submissions

3. The petitioner's application was presented by Learned Counsel, Mr. Miruka, who submitted that the application was brought under sections 29 and 38 of the Law of Succession Act and was seeking to set aside a consent order entered into on 24th September 2015. Under the consent order, the 1st and 2nd petitioners (this appears to be a reference to the applicant, ECK and CC) were to be appointed as the administrators of the estate of M T K (Deceased). Upon setting aside the consent order, according to Mr. Miruka, the applicant should be appointed the sole administrator of the estate.

4. The applicant argues that the consent order did not have her blessings. That she was not consulted. That if she had been consulted, she would have been opposed to the consent as she is the only child of the deceased, while the other parties are not related to the deceased. According to the applicant, the respondents were employees who converted themselves into adopted children.

5. Mr. Miruka further submitted that prior to the present application, another application had been made before Ndung'u, J at the High Court in Nakuru. The said application, according to the applicant's Counsel, which was dated 9th December 2015, brings out the agony the applicant was suffering at the hands of the respondents. In that matter, according to the applicant, a consent had been entered into which gave the applicant access to the deceased's homestead.

6. The applicant asserted that the respondents have no locus to claim as beneficiaries of the deceased. While they were claiming to have been adopted, there was a clear procedure for adoption, while there was no document in this case to show that the respondents had been adopted.

7. Mr. Miruka discounted the letter from the Chief and the funeral programme filed in the matter in which reference is made to the respondents as children of the deceased, noting that they have no evidence of adoption. The applicant therefore urged the Court to allow the application, noting that if the respondents have any claim to the estate, they can raise it during the confirmation of the grant.

The Response

8. In response and opposition to the application, the respondents relied on the affidavit of Mr. Charles Chepkwony sworn on 25th April 2016. Their case was presented by their Learned Counsel, Mr. Mutai.

9. Mr. Mutai submitted, first, that the application was insincere and devoid of merit. This was because the petitioner had filed **Kericho High Court Succession Cause No. 307 of 2015**, through the firm of Tengeche and Kosgei Advocates, in which there was a clear manifestation of the fact that the two respondents were indeed culturally adopted children of the deceased. Mr. Mutai referred the Court to Form No. P&A 5 in that Cause in which the petitioner included the two respondents as the adopted children of the deceased.

10. Secondly, Mr. Mutai referred to the Chief's letter which was produced by the applicant. In the said letter, the two respondents were named as beneficiaries of the estate as adopted children of the deceased.

11. Mr. Mutai further submitted that on 24th September, 2015, when the consent dated 24th September 2015 was recorded, all parties were present in Court on the summons of the Court, among them the parties' Counsel on record and the administration officers who had done the two letters in which the beneficiaries of the estate are named. He also observed that the proceedings were translated from English

to Kipsigis.

12. With respect to the application on 28th January 2016 before Hon. A. K. Ndungu in Nakuru, when a second consent was entered before the Court, the respondents submitted that the applicant was represented by Mr. Miruka. The consent entered before that Court then was to the effect, inter alia, that the applicant and the 1st respondent were to jointly administer the estate.

13. The respondents therefore take the position that there is a consistent conduct on the part of the applicant and recognition that the two respondents were adopted children of the deceased. Further, that the mode of adoption is immaterial in these proceedings as such adoption is a practice among the Kipsigis community in accordance with its culture. Their submission was that whether there was such adoption or not is a subject for a full hearing to determine whether the intention of the deceased was fully manifest and executed.

14. The respondents further argued that they fall within the definition and interpretation of the term "child" under section 3 (2) of the Law of Succession Act read in the context of the new Constitution. Counsel's submission was that the respondents had been taken into the care and custody of the deceased as her children. It was their case that the issue whether the respondents are strangers or children of the deceased, given the contents in the two succession matters relating to the estate of the deceased, namely Succession Cause Nos.305/15 and 307/15, is not a matter to be determined on the basis of an application of this nature. In their view, to do so would be to violate their right to be heard. Such a determination required that evidence be taken, and they prayed that the application be dismissed and the matter gazetted as had been earlier directed.

15. In reply to the submissions by the respondents, Mr. Miruka submitted that the applicant's instructions to her Counsel had not been properly executed. He asserted that annexure "CC1", the letter from the Deputy County Commissioner, which identifies the applicant and the respondents as beneficiaries of the estate, is not the letter she had given to her Counsel then on record. According to the applicant, there was a letter from the Chief, Kiploky Location, dated 2nd June 2015 confirming that she is the only beneficiary of the estate. It was necessary, in the applicant's view, before moving to any other stage, to identify the beneficiaries of the estate, noting that to bring in the respondents into the estate, yet their status is unknown, would be against the Law of Succession Act.

Determination

16. The applicant wishes to set aside a consent order entered into on 24th of September 2015 before Ong'udi J. Her argument is that she was not consulted on the consent, and her instructions were not followed with regard thereto. She has further argued that the respondents are not beneficiaries of the estate, and are strangers thereto. She disputes their assertion that they were adopted by the deceased under Kipsigis customary law. Her argument is that there are no documents evidencing their adoption,that their parents are known, and that one cannot be adopted as an adult.

17. I have considered the pleadings and submissions of the parties, as well as the record of the Court in Kericho High Court Succession Cause Nos. 305 and 307 of 2015.

18. I note that on 24th September 2015, the parties appeared before the Court. Mr. Mutai appeared for the petitioner in **Succession Cause No. 305 of 2015 - Mr. Francis Chepkwony.** Mr. Koskei appeared for the petitioners in **Succession Cause No. 307 of 2015 - E C K and C K L.** The parties agreed that the estate would be dealt with under Succession Cause No. 305 of 2015, while the applicant, E C K, and C C, one of the respondents in this application, would be the petitioner. It was also agreed that the rest of the parties would be listed as beneficiaries of the estate.

19. On 9th December 2015, Mr. Miruka appeared before the Court with an application alleging that the respondents were intermeddling with the estate of the deceased while they had no right to the estate. The matter was sent to the High Court in Nakuru, and on 28th December 2015, a second consent order, referred to in this matter by both the applicant and the respondents, was entered into. Under the second

consent, the applicant and Mr. Charles Chepkwony were again to be the administrators of the estate.

20. I have also considered the documents filed by the applicant and Charles Kipkorir Langat in Succession Cause No. 307 of 2015. In Form No. P&A 5 dated 4th June 2015, they identify the beneficiaries of the deceased, Mary Taplelel Kilel alias Taplele W/O Kilel as:

i. E C K-Daughter

ii. C C-Adopted Son

iii. B C-Adopted Daughter

iv. C K L-Grandson.

21. The letter from the Deputy County Commissioner, Londiani Sub-County, dated 5th June 2015, which was attached to the application by the applicant, also identified the applicant, C C and B C as the dependants of the deceased.

22. In her affidavit sworn on 4th June 2015 and filed alongside the application for letters of administration intestate, the applicant deposes that *"..the other beneficiaries of the estate are not willing to consent to the making of grant in the estate of the above named deceased person."*

23. The totality of the material before me suggests that the applicant is being less than forthright in her averments before this Court. It is strange that she identifies the respondents as beneficiaries of the estate in June 2015, enters into two consents in September and December of the same year in which she consents to being a co-administrator with one of the respondents and the others to be named as beneficiaries, then three months later, on 17th March 2016, she asserts that the respondents are not beneficiaries of the estate and she is the only child and sole beneficiary of the deceased.

24. I am unable, for the above reasons, to find any merit in the application dated 17th March, 2016. All the evidence points to a change of heart on the part of the applicant, which goes against all her averments on oath and the documents that she has filed in Court. In the circumstances, I decline to allow the application.

25. In their submissions, the respondents argued that the question whether they are adopted children of the deceased, adopted in accordance with Kipsigis customary law, can only be determined upon hearing the parties. While the actions and averments of the applicant, E C K, before her applications in December 2015 and March 2016, lend credence to the respondents' claim, I believe that in order to settle the question, it is imperative that the Court takes oral evidence on the point.

26. Consequently, I direct that the orders issued on 24th September 2015 and 28th December 2015 shall remain in force pending further orders of the Court.

27. In the meantime, the question whether the respondents are adopted children of the deceased in accordance with Kipsigis customary law shall be tried by way of oral evidence on a date to be agreed between the parties before any further steps can be taken with regard to the administration of the deceased's estate.

28. It is so ordered.

Dated, Delivered and Signed at Kericho this 28th day of July 2016.

MUMBI NGUGI

JUDGE